Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-937

W. A. CHAFFIN, WOODROW W. COLEMAN, BOBBY BROWN, JAMES P. SADLER, ROBERT HOWELL, and EUGENE BALCH, Trustees of the West Meade Church of Christ,
Petitioners,

vs.

JOHN A. McDONALD and Wife, EVELYN McDONALD,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE AND THE COURT OF APPEALS OF TENNESSEE MIDDLE SECTION

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W. A. CHAFFIN, WOODROW W. COLEMAN, BOBBY BROWN, JAMES P. SADLER, ROBERT HOWELL, and EUGENE BALCH, Trustees of the West Meade Church of Christ,
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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE AND THE COURT OF APPEALS OF TENNESSEE MIDDLE SECTION

Petitioners, W. A. Chaffin, Woodrow W. Doleman, Bobby Brown, James P. Sadler, Robert Howell, and Eugene Balch, Trustees of the West Meade Church of Christ, respectfully pray that writs of certiorari issue to review the judgments of the Tennessee Court of Appeals, Middle Section, and of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

None of the opinions delivered in the Courts below have been reported, officially or unofficially. The appendix contains copies of the Memorandum Opinion and Order of the Chancery Court of Davidson County, Tennessee (*infra.*, pp. A-1-A-2), the Court of first resort, the affirming opinion of the Tennessee Court of Appeals (*infra.*, pp. A-3-A-10), and the orders of the Supreme Court of Tennessee or a member thereof denying Petitioners' Petition for Certiorari and Petition for Rehearing of such denial (*infra.*, pp. A-1-A-12) permitting them to file a Second Petition for Rehearing (*infra.*, p. A-13),[1] and it denying the Second Petition for Rehearing (*infra.*, p. A-14).

JURISDICTION

The judgment of the Tennessee Court of Appeals sought to be reviewed was entered June 27, 1975, and after denial of the Supreme Court of Tennessee of Petitioners' Petition for Certiorari and Rehearing, their Second Petition for Rehearing was denied on October 7, 1976. This Petition for Certiorari is timely filed within 90 days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

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[1] The Second Petition for Rehearing was permitted to be filed by special leave of a member of the Court pursuant to its Rule 32 ("No Second Petition for Rehearing shall be filed by any of the Clerks of this Court unless application has been made and special leave obtained from the Court, or a Judge thereof"), upon a showing that counsel had exhaustively researched the decisions of this Court on the subject of freedom of religion, Petitioners had determined to seek review by this Court in the event a rehearing should be denied by the Supreme Court of Tennessee, and due to failure of mail delivery by the U. S. Postal Service, Petitioners had received no notice of the action of the Supreme Court of Tennessee overruling their initial Petition for Rehearing.

QUESTION PRESENTED

In light of the rationale of *Shelley v. Kraemer*, 334 U.S. 1, whether state judicial power may be utilized in the enforcement of a restrictive covenant to enjoin the trustees of a small church from holding worship services on land purchased by them without actual knowledge of the restrictive covenant, under the Due Process Clause of the 14th Amendment, consistently with the prohibitions of governmental interference with the freedom of religion in the First Amendment to the Constitution of the United States or in religious freedom provisions of the State's Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . no state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

2. The First Amendment to the Constitution of the United States provides, in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

3. Article I ("Declaration of Rights"), Section 3 of the Constitution of Tennessee provides:

> "That all men have a natural indefeasible right to worship All Mighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or maintain any minister against his consent; that no human authority can,

in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship."

4. Article XI ("Miscellaneous Provisions"), Section 16 provides:

"The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights contained, is accepted out of the General Powers of Government, and shall forever remain inviolate."

STATEMENT OF THE CASE

The Petitioner Trustees contracted to purchase real property in the West Meade subdivision in Nashville, Tennessee, under a contract which contained no reference to the existence of restrictive covenants but which expressly states that it was contingent upon "obtaining building permit for a church"[2] without specifying whether such church construction was to be achieved by altering the existing building or by razing it and constructing a new building, and without any mention of the existence of private restrictive covenants. Three months later, they accepted title to their property in their capacity as Trustees of the West Meade Church of Christ, by a deed which made reference to restrictive covenants of record and stated that it was subject thereto, but which did not recite the content of any of the restrictions imposed by such restrictive covenants (Exhibit "B" to Complaint, T.R., pp. 8-9).

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[2] Exhibit "A" to sworn answer, T.R., p. 26. [References herein to the Technical Record (T.R.) are to the bound record of pleadings, affidavits, and orders, which form the record on the basis of which the Tennessee Court of Appeals and the Supreme Court of Tennessee acted herein.]

The actual recorded restrictive covenants (Complaint, Exhibit "A", T.R., pp. 6-7), contained eleven separate restrictions, even including one against ownership or occupancy of any property in the subdivision by people of "African blood" (*Ibid.*, ¶ 7) but contained only one paragraph claimed to be applicable to Petitioners' use of the property (*Ibid.*, ¶ 2). This was divided into a broad provision banning construction except for residential purposes[3] and a much more detailed provision as to the types of usage[4] that could be made of such residential structures after their completion.[5]

Two months after Petitioners acquired the property, Respondents filed suit to enforce the restrictive covenant by enjoining use of the property "for church services" or for "any public gathering," also asking that future construction of any new building for other than private residential purposes be enjoined (T.R., p. 3). After issuance of the temporary injunction, the case was finally heard upon pleadings and affidavits on a motion to dissolve the injunction with agreement that the Chancellor's decision would be dispositive of the case, and the Chancellor, treating the prior injunction against holding public meetings as an injunction against "holding church services in the subject prop-

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[3] "No buildings or other improvements of any kind shall be erectedupon [*sic*] or moved on to said land to be used otherwise tha[n] as a private dwelling house, or improvement in connection therewith, . . ." (*Ibid.*, ¶2).

[4] "[N]o such buildings shall be used as [1] an apartment, duplex, hotel, [2] shop, store, or place of business of any kind, nor [3] as a hospital, asylum, or similar institution, nor [4] as a place of public gathering." It also prohibited the use of any garage, servant's house, and such as a main dwelling house. (*Ibid.*, ¶2). (Bracketed numbers are inserted to separate the different types of usage prohibited by the covenant.)

[5] The summary of this detailed language is not given to question the construction and application of the covenant as a matter of the State Law of Tennessee, but as a factual basis to briefly point out (*infra*, p. 13) that the judicial action of the state courts herein constituted "state action" to a far greater degree than did the action of the Missouri Courts held to be unconstitutional in *Shelley v. Kraemer*, 334 U.S. 1.

erty," held that use of the property as a church would violate both "a covenant restricting the use of property to residential purposes" and "the covenant against use as a place of public gathering." (T.R., pp. 33-35).[6]

Upon appeal, the Tennessee Court of Appeals affirmed, holding that the injunction against the actual conduct of church services on property owned by the Church's Trustees did not violate the protection afforded by the Fourteenth Amendment's Due Process Clause's application to First Amendment rights of religious freedom (*infra.*, pp. 10A-13A), placing its principal reliance upon this Court's initial decision of *Jones v. Opelika*, 316 U.S. 584 (Vacated and Reversed, 319 U.S. 103), and upon its decisions as to the constitutionality of Sunday closing laws. Petitioners petitioned the Supreme Court of Tennessee for Certiorari to review the intermediate appellate court's affirmation on the ground, *inter alia*, that the judgment violated the Due Process Cluase of the Fourteenth Amendment,[7] and the Supreme

[6] In the pleadings, Respondents had avered under oath that the property was being used as a place of public gathering, which the Petitioners denied under oath. The affidavit evidence before the Chancellor included affidavit statements that as many as 15 automobiles had been seen upon the property (T.R., p. 19), and the affidavit conclusion that church services had been held on the property (T.R., pp. 19-21), but there was no evidence that any member of the public had attended any such "church services" other than individuals who are members of the church and for whom Petitioners hold legal title in trust. The evidence also included statements that one affiant had taken the lead in "enforcing the covenants" against sale of the Voss property or West Meade Mansion, to the Elks Club, without any statement of whether this was done by litigation, threats, persuasion, or otherwise, and evidence that this same mansion was used as a church by a group who worshipped under the name of The Lord's Chapel, from 1971 to 1973, during which time the parked cars would sometimes cover "a good portion" of the 7-acre grounds of the mansion for the group's thrice-weekly meetings and additional evangelical meetings (T.R., p. 32). Except for affiants' opinions as to the effect of church services upon land values, this was all the substantial evidence introduced in the Chancery Court.

[7] To clearly demonstrate that such federal constitutional question was presented, there is printed below, in Appendix B, a copy of the Petition for Certiorari filed in the Supreme Court of Tennessee, without the supporting Assignment of Errors and Brief.

Court of Tennessee denied certiorari. Though denials of certiorari in Tennessee State proceedings do not imply judicial nonaction, but constitute an actual affirmance of the *results* of the intermediate court's decision, but not necessarily upon the rationale utilized by the intermediate court, the Supreme Court of Tennessee in this case explicitly approved the rationale of the Tennessee Court of Appeals[8] (*infra.*, p. A-11).

The federal question was first raised by assignment of error in the Tennessee Court of Appeals, which acted upon the question on its merits despite the fact that such question was not raised by the pleadings in the trial court and that the record does not establish that it was raised in oral argument.

[8] The Supreme Court of Tennessee stated that ". . . it is the judgment of this Court that the Court of Appeals has correctly dealt with the issues."

REASONS FOR GRANTING THE WRIT

The federal question presented is one of substance not heretofore determined by this Court, but to the extent that it has not been specifically determined, the decision thereof by the Tennessee appellate courts is probably not in accord with applicable and long-respected decisions of this Court.

By their judgments, the Tennessee appellate courts acted directly contrary to the rationale of this Court's holding in *Shelley v. Kraemer*, 334 U.S. 1, that a state may no more take liberty or property without due process of law through its judicial branch than it may through its legislative or executive branches, though the interest there protected was the right to equal protection of the laws rather than to freedom of religion.

The case is one of extreme and fundamental importance due to the fact that the state, utilizing what this Court called the full panoply of state powers, *Shelley, supra.* (334 U.S. at p. 19), prevented people from utilizing their own property to meet with their trust beneficiaries to do together those acts which normally constitute church services worshiping God, praying to God, reading Holy Scripture, preaching and hearing sermons which propound Devine messages.

This is rendered important and probably contrary to this Court's prior holdings for numerous reasons.

One of these is that the sole ground of state action is the enforcement of private contracts, the identical ground upon which Missouri judicial action was reversed in *Shelley, supra.* Any supposed distinction based upon the fact that the right to worship God is protected by the First Amendment rather than by the Equal Protection Clause of the Fourteenth Amendment appears to be overcome by this Court's prior decisions that due process rationale of the Fourteenth Amendment bans state judi-

cial intrusions upon the freedom of religion in *Kreshik v. St. Nicholas Cathedral of the Russsian Orthodox Church of North America,* 363 U.S. 190 and *The Serbian Eastern Orthodox Diocese v. Milivojevich,* — U.S. —, 44 U.S. Law Week 4927 (June 21, 1976).

Another reason that the state action is contrary to this Court's probable decision is that this Court, in absolutely protecting religious freedom from direct state intrusion, has often done so by comparing out-of-church religion-inspired action with particular in-church action such as preaching and Bible reading, for the purpose of demonstrating that such out-of-church activity was indeed an exercise of the freedom of religion, *Murdock v. Pennsylvania,* 319 U.S. 105,[9] *Abington School District v. Shempp,* 374 U.S. 203[10] and *Engel v. Vitale,* 370 U.S. 421.[11] When these principal constituent elements of a church service are utilized by this Court to declare unconstitutional state infringement of out-of-church action, then it would appear that state action which directly conglomerates all the constituent elements of the worship of God in church services and directly forbids them by injunction punishable by contempt proceedings either is forbidden by the protection afforded religion by the Due Process Clause of the Fourteenth Amendment, or else *Murdock, Abbington,* and *Engel,* no longer have validity.

The probable incorrectness of the state decisions sought to be reviewed is indicated further by the fact that the Tennessee Courts placed considerable reliance upon cases upholding the "Sunday Closing Laws," though those cases proceeded upon the rationale (and in fact fully demonstrated) that such laws

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[9] Comparing colporteurial activities with worship in churches and preaching from pulpits (319 U.S., at pp. 108-109).

[10] Referring to use of the Bible for worship purposes (374 U.S., at p. 224).

[11] Referring to the conduct of group prayer (370 U.S., at pp. 424-427).

had become secular rather than religious in their provisions and in their nature, *McGowan v. Maryland*, 366 U.S. 420, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, and *Braunfield v. Brown*, 366 U.S. 599. While none of these cases directly infringe the freedom of religion because in none of them did the law command that the individual work on the day he recognized as his Sabbath, but only prevented the parties from working on the days that their religious beliefs would *allow* them to work, this case represents the direct state destruction of the right of landowners to worship God on their own property.[12] It is doubtful if such forceful interference could ever be characterized as having a merely indirect effect upon religion.

Probable conflict of the state decision herein with applicable decisions of this Court is further demonstrated by the fact that the state courts based their principal reliance upon this Court's initial opinion in *Jones v. Opelika*, 316 U.S. 584, without noting that such opinion was not the final opinion of this Court because it was recalled, vacated, and reversed, *Jones v. Opelika*, 319 U.S. 103, as a companion to the landmark decisions of *Murdock v. Pennsylvania*, 319 U.S. 105 and *Martin v. Struthers*, 319 U.S. 141.

Inconsistency with this Court's decisions is further demonstrated by the fact that the Tennessee courts in relying upon the discredited initial *Opelika* decision, *supra.*, failed to notice that it is held that state intrusion upon First Amendment rights must be judged by the nature of the right impaired rather than the character of the law utilized in the impairment, *Thomas v. Collins*, 323 U.S. 516, and the impairment here was based solely upon contractual property law rather than the nature of the constitutional freedom of religion.

[12] Possibly the closest any opinion in these cases came to a demonstration of actual conflict between religious tenets and the Sunday Closing Laws was in a scriptural quotation by Mr. Justice Douglas in his opinion in *Braumfield, supra*, "Six days shalt thou labor and to do all thy work." (366 U.S., at p. 566). A real conflict would have been presented had any of the parties' religions required believers to actually work six full days every week, foregoing vacations and holidays.

Although the discredited *Opelika* rationale that the state may make laws as to the places where constitutional rights may be exercised has been applied in other cases, it is noteworthy that the instant action is inconsistent with such applications, in which this Court has permitted regulation of the place rights may be exercised primarily in regard to derivative rights, instead of the right to worship, the right to speak, and the right to print and distribute ideas. For example, under the rationale of the protection of constitutional rights to communicate, the Court has countenanced state action restrictive of the right to publicly exhibit nude movies. *Erznoznik v. Jacksonville*, 422 U.S. 205, and *Young v. American Mini Theatres, Inc.*, — U.S. —, 44 U.S. Law Week 499 (June 24, 1976). Perhaps such derivative rights may be more freely limited than the actual right to speak, print, or worship, because in fact, the Constitution does not explicitly protect the right to communicate. The First Amendment contains no prohibition against laws interfering with visual communication other than and in the form of printing. At the time the First Amendment was written, performances in Shakespeare's Globe Theatre were past history, yet the common law had long prohibited public nudity. Visual communication by exhibiting the body is simply not within the expressed prohibitions of the First Amendment but is protected solely by inference from the fact that the First Amendment protects *some* forms of communications. Lewd exhibitionism was indictable as common law. If permission for state intrusion upon these rights created only on an inferential basis be applied to the primary rights themselves, then this Court's decisions designed to protect human rights could themselves furnish the means for the destruction of these primary rights.

The degree of state interference in this case is far greater then the degree of intentional state interference reviewed by this

Court in *Shelley, supra.*, because the Missouri Court merely enforced restrictive covenant law without apparent departure from prior precedence. In this case, however, Tennessee Law had firmly established the principle that property ownership could not be infringed except by explicit covenants, not to be expanded by implication. *Turnley v. Garfinkle*, 211 Tenn. 125, *Shea v. Sargent*, — Tenn. —, 499 S.W.2d 871 (Tenn., 1973), *Southern Advertising Company v. Sherman*, 43 Tenn. App. 323. When the teaching of these authorities is coupled with a simple of reading of the covenants—revealing that in fact the covenants did not ban *use*, but only banned *construction* for non-residential purposes, and that in its use prohibitions, those prohibitions on institutional use did not prohibit use of a previous residential structure for church purposes, and that there is *no* evidence in the record that the worship services were opened to the public at large instead of merely to members of the church who were beneficial owners of the property, then it is respectfully submitted that the state action involved in this judicial decision is far more explicitly action by the State of Tennessee than was the action of the Missouri courts in *Shelley, supra.*

CONCLUSION

It is respectfully submitted that the writ should be granted because, as Petitioners submitted to the Supreme Court of Tennessee, if it is true that "Tennessee is constitutionally forbidden to prohibit the publication of photographic materials viewed by large numbers of its people as obscene, Tennessee may nevertheless forbid people to worship God on their own property . . ." then such law "would not receive—or deserve—the people's respect." Such an open destruction of the right to worship deserves this Honorable Court's careful consideration.

Respectfully submitted,

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APPENDIX

APPENDIX A

Memorandum Opinion, Chancery Court of Davidson County, Tennessee

JOHN A. McDONALD, et ux. vs. No. A-3187-A A. W. CHAFFIN, et al.,	IN THE CHANCERY COURT PART ONE, AT NASHVILLE.

Memorandum

(Filed October 31, 1974)

Under previous orders of the Court the defendants were temporarily enjoined from holding church services in the subject property on the belief that such use of the property violated the restrictive covenants in force for the subdivision. The defendants have moved to dissolve the injunction and at the hearing on the motion the parties agreed that the action of the Court on the motion would be determinative of the whole case. Therefore, upon consideration of the pleadings, affidavits, briefs and argument, the case is ready for final determination.

The restrictive covenant in question contains, in part, the following language:

> (2) No buildings or other improvements of any kind shall be erected upon or moved on said land to be used otherwise than as a private dwelling house or improvement in connection therewith . . . nor as a place of public gathering.

The sole question presented is whether or not the use of the property as a church violates this restrictive covenant.

The Court is of the opinion that such use does violate the restrictive covenants on two counts: (1) as being a use otherwise than as a private dwelling and (2) as a place of public gathering.

The restrictive covenants seem to clearly show an intent to exclude use otherwise than as a private dwelling house. The clear weight of authority is that use of property as a church will violate a covenant restricting the use of property to residential purposes. Nor does the fact that the value would not be materially lessened affect the enforcability of such a covenant. 20 Am. Jur., 2d, page 773.

The Court also is of the opinion that use as a church violates the covenant against use as a place of public gathering.

Therefore, the judgment of the Court will be that the temporary injunction heretofore entered should be made permanent and that the plaintiffs should be relieved of the obligation on the bond heretofore posted. The costs should be taxed against the defendants.

Mr. Taylor shall prepare the decree.

/s/ BEN H. CANTRELL
Chancellor

This October 31, 1974.

xc: Mr. Richard D. Taylor
Mr. William S. Hofstetter

(Opinion, Tennessee Court of Appeals)

JOHN A. McDONALD, ET UX
Plaintiffs-Appellees
vs.
A. W. CHAFFIN, ET AL
Defendants-Appellants
} DAVIDSON EQUITY

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

Appealed from Part One, Chancery Court of Davidson County, Tennessee

The Honorable Ben H. Cantrell, Chancellor

Filed: June 27, 1975

RICHARD D. TAYLOR of Glasgow, Adams & Taylor, 300 James Robertson Parkway, Nashville, Tennessee 37201, Attorney for Plaintiffs-Appellees.

HARRY S. LESTER of Lester, Hildebrand, Nolan, Lane Underhill, Mondelli, Flynn & Porter, 214 3rd Avenue, North, Nashville, Tennessee 37201, Attorney for Defendants-Appellants.

AFFIRMED.

Frank F. Drowota, III
Judge

JOHN A. McDONALD, ET UX
Plaintiffs-Appellees
vs.
A. W. CHAFFIN, ET AL
Defendants-Appellants
} DAVIDSON EQUITY

OPINION

(Filed June 27, 1975)

This appeal presents the question whether a covenant restricting the use of property to residential purposes prevents the use of such property as a church.

Plaintiff-appellees John A. McDonald and Evelyn McDonald are property owners seeking to enforce a covenant restricting the use of certain property purchased by defendant-appellants A. W. Chaffin, Woodrow W. Coleman, Bobby Brown, James P. Sadler, Robert Howell, and Eugene Balch, who are Trustees of the West Meade Church of Christ.

In October of 1973 defendants completed the purchase of property located at the corner of Harding Road and Brook Hollow Road in the West Meade Farms subdivision in Davidson County.[1] The deed provided that "[t]his conveyance is made subject to restrictive covenants and easement of record in Book 1427, page 19, Register's office for Davidson County, Tennessee, filed for record prior to February 15, 1950."

The restrictive covenants provided, in pertinent part:

> (2). No buildings or other improvements of any kind shall be erected upon or moved on to said land to be used other-

[1] The property is lot number 55 on the Plan of Section I, West Meade Farms, Inc., of record in Book 1424, page 47, Register's office of Davidson County.

> wise tha[n] as a private dwelling house, or improvement in connection therewith, and no such building shall be used as an apartment, duplex, hotel, shop, store or place of business of any kind, nor as a hospital, asylum, or similar institution, nor as a place of public gathering. No garage, servant's house, or other improvement shall be erected, maintained, or used except in connection with a main dwelling house built in conformity with these restrictions, and in no event shall any such garage, servant's house or other improvements be used as a main dwelling either temporarily or permanently.
>
> * * * * * * *
>
> (8). The provisions of this instrument and all restrictions and covenants herein contained shall continue in full force and effect until December 31, 1985.
>
> (9). All of the restrictions and provisions herein contained shall be deemed to be covenants running with the land to which they apply, as set out herein, and shall be binding upon and for the benefit of the purchasers and owners of the lots on said recorded plan, and their respective heirs, successorys [sic], administrators and assigns, and may be enforced by all or any of the owners of property in said subdivision and the failure to enforce these restrictions because of any one violation shall not be deemed a waiver of such right as to a subsequent or other violation, such right being a continuing one.

On December 5, 1973, plaintiffs, owners of nearby property in the subdivision, filed a complaint in the Chancery Court of Davidson County alleging that defendants were using the restricted property for church services and asking that defendants be temporarily and permanently enjoined "from using the property for church services or other public gatherings or from constructing or erecting on the premises any building other than a private residence during the period said restrictive covenants

are effective." On December 17, affidavits by three other property owners were filed. John T. Conners, Jr. stated that he had been "a strong advocate throughout the last ten years of keeping our neighborhood totally residential notwithstanding attempts to locate other activities in the area" and outlined his efforts in preventing the construction of a high school in the area and in "enforcing the covenants" on certain property in the neighborhood that had been contracted for sale to a private club. Jerome Glaser stated that he had "personally witnessed the regular use of the subject property on each Sunday and Wednesday for the past few weeks as a church and [had] seen upwards of fifteen cars parked in the driveway and on the lawn." Roy Shainberg stated that he was aware that church services were being held on the property.

On December 18, 1973 defendants answered the complaint, admitting that "more than once since they have purchased the property, they have met on the premises in a private religious gathering" and denying that "the residence has ever been used as a place of public gathering." The contract for purchase of the property was submitted to the court, and showed that the vendor was aware of the use to which defendants intended to put the property, as the contract was "contingent on obtaining building permit for a church."

On December 28, 1973 the Chancellor entered a Decree finding that "the plaintiffs' application for a temporary injunction to restrain the defendants from using the premises as a place of public gathering in violation of the restrictive covenants applicable to said property is well-taken and should issue conditioned upon the plaintiffs making bond in the amount of $2,000.00. The Chancellor ordered that the injunction take effect January 1, 1974 and continue pending further orders of the court.

On September 16, 1974 defendants moved the court to dissolve the temporary injunction. On October 28, 1974 defend-

ants filed an affidavit by Howard F. Butler. Mr. Butler stated that he is a member of the "Lord's Chapel" and that from late 1971 until April 1, 1973 the church had been permitted to use certain other property in the neighborhood for religious services on a regular basis, without objection from other property owners.

On November 7, 1974 the Chancellor entered a Decree making the temporary injunction permanent, and incorporating a Memorandum Opinion of October 31, 1974. The Memorandum reflected that the parties had agreed that the action of the court on the motion to dissolve the injunction would be determinative of the case. The Chancellor held that defendants were using their property as a church and that such use violates the restrictive covenant "on two counts: (1) as being a use otherwise than as a private dwelling and (2) as a place of public gathering." From the final decree, defendants prayed for and were granted this appeal, which they have perfected.

Appellants' single assignment of error is that "the trial court erred in ruling that the injunction against the defendants should be made permanent because such ruling violates the First Amendment of the United States Constitution and since the Restrictive Covenants pertaining to the property do not restrict the use of the same as a matter of law so as to prohibit the defendants from conducting private ownership in the residence in question."

Restrictive covenants are to be strictly construed. That is, they are to be read without the drawing of unnecessary implications and will not be taken to preclude that which is not plainly prohibited. *Shea v. Sargent*, 499 S.W.2d 871, 873 (Tenn. 1973). But in reading the covenant we should give the words a fair and reasonable meaning in order to effectuate its purpose. *Hamilton v. Broyles*, 57 Tenn.App. 116, 415 S.W.2d 352 (1966).

We agree that any use of the subject property as a church building would constitute a violation of the applicable restrictive covenant. Such use is not for residential purposes, and we take judicial notice that such use would ordinarily entail regular public gatherings. This result is mandated by the plain meaning of the covenant and is consistent with the "complete accord" reached by the many other courts that have considered the question of the applicability to churches of covenants restricting property to residential use. See Annot., 13 A.L.R.2d 1239.

There is no bill of exceptions in this case and we find no proof in the record to contradict the Chancellor's finding that the building on the subject property was in fact used as a church and not as a residence, or that the worship services were public gatherings. It was conceded by appellants in oral argument that no one resides in the structure. Thus we are not faced with any issue involving the applicability of such restrictive covenants to persons conducting private religious worship services in their homes.

The remaining question is whether federal[2] constitutional restrictions exist on the power of the Chancery Court to enforce the restrictive covenant in this case. The restrictive covenant here involved was expressly incorporated by reference into the deed conveying the property to defendants. As such the restriction originated purely in private conduct. It is not clear whether judicial enforcement of the private agreement, *in such a case as this*, ought to trigger constitutional restrictions designed to restrain action by the federal and state governments. Of course, the agreement rests upon state law recognizing the validity of such limitations on land use and requires for its effectiveness enforcement by the state. See *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (court enforcement of a restrictive covenant excluding persons of designated race or

[2] Appellants have raised no state constitutional issues.

color from the ownership or occupancy of real property constitutes state action).

Assuming, *arguendo*, the presence of state action, we find that court enforcement of the restrictive covenant does not violate the first amendment. Enforcement of a facially neutral restriction on the use of land for other than residential purposes works only an incidental or indirect burden on appellants no different from that borne by other property owners and does not rise to the level of a violation of their rights of assembly or free exercise of religion. See *Braunfield v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). In this circumstance, churches are on the same plane as other property owners with respect to the use of land. Because of the incidental nature of the restriction, we are not obligated to find a "compelling" state interest to support the restriction. Compare *Braunfield v. Brown*, supra, with *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

We are not here faced with a situation in which persons are effectively restricted from establishing a place of worship due to a pervasive system of restrictive covenants or zoning throughout the area. Nor are we confronted with an attempt to secure the assistance of the state in the discriminatory enforcement of restrictions as between religions.[3] The first amendment does not preclude reasonable regulation of the time, place, or manner of the exercise of constitutionally protected activities. *Jones v. Opelika*, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691 (1941). The Chancellor was not in error in enforcing the place restriction agreed upon by the previous owners of the private property

[3] We do not understand the affidavit of Howard F. Butler as establishing an intent by surrounding property owners to engage in discriminatory enforcement of the covenant. Appellants have not so interpreted it, in either their brief or oral argument. It appears the affidavit was originally offered in an attempt to prove a waiver of the restrictive covenant, a contention that has not been pursued in this Court.

herein involved. Cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

The decree of the Chancellor is affirmed. Costs of the appeal are taxed to appellants.

Affirmed.

/s/ FRANK F. DROWOTA, III
Judge

Shriver, J. J., concurs.

Todd, J. concurs.

(Order, Supreme Court of Tennessee, Denying the Writ of Certiorari)

In the Supreme Court of Tennessee
at Nashville

W. A. Chaffin, Woodrow W. Coleman, Bobby Brown, James P. Sadler, Robert Howell, and Eugene Balch, Trustees of the West Meade Church of Christ, Petitioners, vs. John A. McDonald and wife, Evelyn McDonald, Respondents.	Davidson Equity

ORDER

(Filed November 10, 1975)

Upon consideration of the petition, briefs, and the entire record in the cause, it is the judgment of this Court that the Court of Appeals has correctly dealt with the issues.

The petition for certiorari is denied at the cost of the petitioners.

Per Curiam

(Order, Supreme Court of Tennessee, Denying Petition for Rehearing)

In the Supreme Court of Tennessee
at Nashville

W. A. Chaffin, Woodrow W. Coleman, Bobby Brown, James P. Sadler, Robert Howell, and Eugene Balch, Trustees of the West Meade Church of Christ, Petitioners, vs. John A. McDonald and wife, Evelyn McDonald, Respondents.	Davidson Equity

ORDER

(Filed December 8, 1975)

A petition has been filed asking the Court to reconsider its denial of the writ of certiorari in this case. Having examined said petition, the Court is of the opinion that the same is not well taken, and it is accordingly denied.

Enter this 8th day of December, 1975.

Per Curiam

(Order, Harbison, J., Allowing Filing of Second Petition for Rehearing)

In the Supreme Court of Tennessee at Nashville

W. A. Chaffin, Woodrow W. Coleman, Bobby Brown, James P. Sadler, Robert Howell, and Eugene Balch, Trustees of the West Meade Church of Christ, Petitioners, v. John A. McDonald and Wife, Evelyn McDonald, Respondents.	Davidson Equity

ORDER

(Filed October 4, 1976)

Upon motion presented to the undersigned member of the Court incorporating a copy of a second petition for rehearing under the final paragraph of Rule 32,

It Is Ordered that the Petitioners be, and they hereby are, granted special leave to file such second petition for rehearing.

October 4, 1976.

/s/ WILLIAM J. HARBISON
Justice

(Order, Supreme Court of Tennessee, Denying Second Petition for Rehearing)

In the Supreme Court of Tennessee at Nashville

W. A. Chaffin, Woodrow W. Coleman, Bobby Brown, James P. Sadler, Robert Howell, and Eugene Balch, Trustees of the West Meade Church of Christ, Petitioners, v. John A. McDonald and Wife, Evelyn McDonald, Respondents.	Davidson Equity

ORDER

(Filed October 7, 1976)

A second petition for rehearing from denial of the petition for certiorari has been filed in this cause. After consideration of same, the Court is of the opinion that said petition is not well taken and the same is accordingly overruled at the cost of petitioners.

Enter this 7 day of October, 1976.

For the Court:

By WILLIAM J. HARBISON
WILLIAM J. HARBISON

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE

W. A. CHAFFIN, WOODROW W. COLEMAN, BOBBY BROWN, JAMES P. SADLER, ROBERT HOWELL, and EUGENE BALCH, Trustees of the WEST MEADE CHURCH OF CHRIST, Petitioners, vs. JOHN A. McDONALD and wife, EVELYN McDONALD, Respondents.	Davidson Equity

Petition for Certiorari

Come Petitioners, being the Trustees of the West Meade Church of Christ, and respectfully petition the Court to issue the Writ of Certiorari to the Court of Appeals of Tennessee, Middle Section, to review that learned Court's judgment of June 27, 1975 because:

1. The said Court's judgment violated the freedom of religion of each of the Petitioners and of the numerous *cestuis que trust* by forbidding them to use property owned by them as a Church, in violation of the First and Fourteenth Amendments to the Constitution of the United States, as construed by the United States Supreme Court. The learned Appellate Court's decision was in error in the conclusion it reached as to the

United States Supreme Court's construction of the religious freedom provisions of the First Amendment because (a) The United States Supreme Court decision upon which the learned Court of Appeals relied and which was essential to its conclusions herein in fact was not the decision of the United States Supreme Court, because the said Court recalled its mandate therein, vacated the decision upon which the learned Court of Appeals relied, and reversed the same; (b) Other United States Supreme Court decisions upon which the said learned Court relied involved state actions which in fact did not infringe the freedom of religion, were recognized by the said Supreme Court as not infringing such freedom, and were based upon the rationale that such state actions were totally secular in intent and in direct effect; and (c) First Amendment decisions by the United States Supreme Court recognized that the power of the state cannot constitutionally be used to prohibit or regulate the congregation of people to worship Almighty God by reading and studying His scriptures, communicating with Him by prayer, and receiving the teaching of His word in the form of the preaching of His ordained ministers.

2. Such action by the learned Court of Appeals affirming the judgment of the Chancery Court of Davidson County is impermissible under Article I, § 2 of the Constitution of Tennessee as demonstrated by the rationale of decisions by the Supreme Court of the United States, which are most persuasive if not irrefutable. For reasons set out in detail in the brief and supporting argument filed herewith, the decision of the said learned Court is beyond its power even though violation of the said provision of the Constitution of Tennessee by the Chancery Court of Davidson County was not assigned as error by these petitioners in seeking reversal of the Decree of the said Chancery Court.

3. The learned Court of Appeals erred in holding that the congregation of individuals who are *cestuis que trust* on property

of which they are the beneficial owners is a "public gathering," so as to come within the prohibitions of the restrictive covenant on the basis of which the Davidson County Chancery Court issued its injunction; and such issue should be considered and ruled upon by this Court because (a) propriety requires that ruling upon constitutional objections be avoided whenever a case can be disposed of upon other legal grounds, (b) the said Appellate Court's construction of the restrictive covenant is contrary to prior authority requiring strict construction of such covenants, and (c) in considering whether the congregation of owners of real property and their invitees upon their own property is a public meeting within the meaning of that and similar terms used in restrictive covenants, consideration should be given to consequences unnoticed by the learned Court of Appeals, which can flow from a determination that a gathering is a public gathering under various federal constitutional and statutory provisions.

Finally, though Respondents cited and relied upon numerous decisions by the Courts of other states construing restrictive covenants with little or no attention to federal and state constitutional provisions regarding the freedom of religion, it is unthinkable that any Court in the United States is empowered, under any circumstances, to forbid individuals from worshipping God according to their own consciences when the general forms of such worship are not shown to be substantially different from the general form of all major western religions, and when there is no claim that the religious rites or worship include any practices which violate the criminal laws enacted for the protection of life and limb.

WHEREFORE, Petitioners respectfully pray that this Court order the Writ of Certiorari to issue to the Tennessee Court of Appeals, that it reverse the decision of the said Court of Appeals and order the case remanded to the learned Chancellor for the assessment of damages for wrongfully obtaining the injunction

violating the freedom of religion of the Petitioners and of the equitable owners of the property whose legal title is held by the Petitioners.

Respectfully submitted,

BRANSTETTER, MOODY & KILGORE
Attorneys for Petitioners
/s/ CECIL D. BRANSTETTER
/s/ CARROL D. KILGORE
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